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BEFORE THE ARIZONA CORPORATION COMM...

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TONY WEST
Commissioner
CARL J. KUNASEK
Commissioner

INTERVENTION

IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH §271 OF THE TELECOMMUNICATIONS ACT OF 1996	)	**DOCKET NO. T-00000A-97-0238**
	)	
	)	**MOTION OF JOINT INTERVENORS, TCG-, MCI AND SPRINT TO COMPEL RESPONSES TO DATA REQUESTS JI-130, JI-131, JI-132 AND JI-133**

Joint Intervenors AT&T Communications of the Mountain States, Inc., TCG-Phoenix, MCI WorldCom, Inc. and Sprint Communications Company, L.P. (collectively, "Joint Intervenors") move to compel U S WEST Communication, Inc. ("U S WEST") to respond to data requests JI-130, JI-131, JI-132 and JI-133.

I. INTRODUCTION

A. Procedural Status

On April 14, 1999, Joint Intervenors served, among others, 4 data requests seeking information and documents relating to any review by any outside or third party consultants that U S WEST has retained to study, evaluate or analyze the performance of its interfaces and/or access that U S WEST provides to its operation support systems ("OSS") for competing local exchange carriers ("CLECs") (*See* Joint Intervenors' Data Request Nos. JI-130, JI-131, JI-132 and JI-133). On April 26, 1999, U S WEST objected to all four data requests to the extent they seek the production of documents protected by the attorney-client privilege, the work product doctrine or the self-evaluation privilege. Then, on May 7, 1999, U S WEST filed an identical

supplemental response to each request directing Joint Intervenors to an attached privilege log ("Privilege Log"). A copy of U S WEST's supplemental response to the data requests (which also contain the original text of each request) and the Privilege Log are attached hereto as Exhibit A.[1]

The heading to the Privilege Log identifies this docket. However, the numbered data requests listed in the first column of the Privilege Log do not contain any of the numbers of the data requests for which U S WEST has purportedly filed the log, e.g., JI-130 through J1-133. As it turns out, except for the heading, the Privilege Log U S WEST filed in this docket is identical in every respect to a privilege log U S WEST previously filed in Section 271 proceedings with the New Mexico State Corporation Commission. The content of four of the data requests listed in the first column of the Privilege Log (037, 038, 041 and 042) are identical to and correspond with Joint Intervenors' data requests JI-130, JI-131, JI-132 and JI-133, respectively. Joint Intervenors will assume, for purposes of this motion, that U S WEST inadvertently filed the Privilege Log in these proceedings without changing the data request numbers and will direct its arguments in this motion based upon that assumption.

B. Summary of Argument

The Privilege Log lists 25 documents. As to these 25 documents, U S WEST has failed to demonstrate in even the most cursory manner how these documents are privileged. The documents listed in the Privilege Log are (based on the description given) either not protected by any privilege or Joint Intervenors cannot determine whether any privilege or protection applies.

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[1] U S WEST also asserted the attorney-client, work product and self-evaluation for JI-3 but did not produce a privilege log for that data request. U S WEST should be ordered to produce a privilege log or be deemed to have waived any objections as to JI-3.

The Privilege Log provides the most cryptic descriptions of 25 select documents. The description in most cases does not exceed a few words or a short phrase. On the basis of these descriptions no third party could reasonably and objectively evaluate whether any of these documents fall within the scope of any legally cognizable privilege or protection.

Absent U S WEST's use of the well known acronym "OSS," it would be difficult to discern the nature of any of the documents except in the most generic sense (i.e., letter, report or memo). Indeed, were the acronym "OSS" actually removed from the Privilege Log, the nature or identity of the documents would become unknowable to the objective reader.

It appears, based on use of the acronym, however, that most of the documents relate in some manner to OSS and, in particular, the preparation of OSS assessment reports by unnamed consultants A, B & C. U S WEST contends that all the documents are protected from discovery by the attorney-client privilege and the attorney work-product doctrine.[2] Beyond the vague descriptions contained in the Privilege Log, and despite the obvious relevance of such reports, U S WEST does not provide any further factual description of the nature or content of the reports, assessments or the other documents listed in the Privilege Log. Furthermore, U S WEST does not specify or describe in any manner the nature or scope of the investigative work done by these consultants. For the following reasons, the Commission should reject the privilege contentions of U S WEST:

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[2] U S WEST also contends for the very first time in the Privilege Log that the documents are also protected by the so-called "attorney self-critical corporate analysis privilege". Joint Intervenors is not aware of any state or federal court in Arizona that has adopted this privilege. Moreover, the United States Court of Appeals for the Tenth Circuit has criticized the privilege in the context of the production of law enforcement records. As one District Court in the Tenth Circuit concluded, "[T]he theoretical basis underlying a "self-policing" or "self-critical-analysis" type of privilege is, in this judge's view, fundamentally flawed. It has been questioned and challenged by many, including the Tenth Circuit and the revered Judge Weinstein." ***Mason v. Stock***, 869 F. Supp. 828, 834 (Kan. 1994) citing *Denver v. Lichtenstein*, 660 F.2d 432 (10th Cir. 1981). U S WEST does not assert any facts, argument or legal authority in support of such a privilege.

- The documents are not protected by the Arizona attorney-client privilege. This privilege only protects the disclosure of actual communications between an attorney and client made for the purpose of facilitating the rendition of professional legal services to the client. U S WEST does not contend that the reports or assessments listed in the Privilege Log contain any attorney-client communications. Moreover, those few documents listed in the Privilege Log which are purportedly communications (8 out of 25 documents) are not protected by the privilege. U S WEST has failed to provide any information from which the Commission could determine whether the privilege attaches to such documents. The attorney-client privilege simply has no application to the OSS reports, studies or other documents listed in the Privilege Log.

- The reports are not protected from discovery under the work-product doctrine. The work product doctrine only protects attorney work-product prepared "in anticipation of litigation." A document is only prepared in anticipation of litigation if the primary motivating purpose behind creation of the document was to aid in pending or future litigation. U S WEST prepared the consultants' reports listed in the Privilege Log to evaluate its compliance with the regulations of the FCC under the Telecommunications Act of 1996 ("Act"), an activity undertaken in the ordinary course of U S WEST's business. As to the other documents contained in the Privilege Log, there is no information provided by U S WEST to indicate that such documents were prepared in anticipation of litigation.

- Even if the Commission concludes that the reports or other documents identified in the Privilege Log, in part, are work product prepared in anticipation of litigation, they are nonetheless subject to discovery. Work product prepared in anticipation of litigation is discoverable if the party seeking the documents has a substantial need for the documents and the party cannot, without undue hardship, obtain the equivalent of the materials by other means. Joint Intervenors cannot replicate the efforts of the consultants as their work was performed while U S WEST engaged in the development of its OSS interface (i.e., Interconnect Mediated Access or IMA)

C. Statutory and Regulatory Framework Which Require Production of Reports Relating to U S WEST's Operational Support Systems

The documents Joint Intervenors have requested U S WEST produce concern the very core of these proceedings: U S WEST's compliance with Section 271 of the Act and, in particular, whether U S WEST has fulfilled its long-standing obligation to provide non-discriminatory access to OSS functionality. As U S WEST itself concedes, the documents are not peripheral or tangential to the issues pending before this Commission. Thus, to fully and

adequately consider U S WEST's assertion of privilege and the work product doctrine, the Commission must consider the very extensive regulatory requirements, as affirmed by the appellate courts, regarding OSS adopted since passage of the Act.

Under Section 251(c)(3) of the Act, a Bell Operating Company ("BOC"), U S WEST has a duty to provide CLECs with access to unbundled network elements under terms and conditions that are non-discriminatory, just and reasonable. 47 U.S.C. §251(c)(3). In rules promulgated in August of 1996, the FCC determined that OSS functions are network elements and that BOCs such as U S WEST must provide nondiscriminatory access to OSS pursuant to Section 251(c)(3).

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15660-61 (1996) ("***Local Competition Order***"). In particular, the FCC determined that BOCs such as U S WEST must provide new entrants access to OSS functions for pre-ordering, provisioning, maintenance, repair and billing that is equivalent to the access the BOC provides to itself, its customer or other carriers. Id. at 15766. The obligation to provide non-discriminatory access to OSS is central to the Commission's inquiry in this proceeding.[3] The FCC has focused, in evaluating Section 271 applications filed by BellSouth and Ameritech for authority to provide long distance services within their regions, on whether BOCs are providing sufficient access to each of the critical OSS

[3] The FCC first ordered BOCs like U S WEST to provide non-discriminatory access to OSS in August 1996 in the ***Local Competition Order***. The FCC ordered that BOCs provide such access as expeditiously as possible but in no event later than January 1, 1997. On December 11, 1996, U S WEST filed a request for waiver of its obligation to provide access to OSS by January 1, 1997. The FCC later rejected U S WEST's request for waiver of the deadline requirement. *See In the Matter of U S WEST's Petition for Waiver of Operations Support Systems Implementation Requirements* MEMORANDUM OPINION AND ORDER, CCBPol 96-25 Adopted: October 22, 1997 Released: October 23, 1997

functions and whether the OSS functions that have been deployed also are operationally ready.[4] The FCC rejected the Ameritech and BellSouth applications to provide long distance service within their respective service territories due in large part to the fact that neither BOC adequately demonstrated compliance with its duty to provide access to its OSS. As to Ameritech, the FCC found that, "Ameritech has not demonstrated that the access to OSS functions that it provides to competing carriers for the ordering and provisioning of resale services is equivalent to the access it provides to itself. . . . Ameritech has failed to provide us with empirical data necessary for us to analyze whether Ameritech is providing nondiscriminatory access to all OSS functions, as required the Act." ***Ameritech Michigan Order***, ¶128. As to BellSouth, the FCC concluded that, "BellSouth has failed to demonstrate that it offers to competing carriers nondiscriminatory access to OSS functions, as required by the competitive checklist." ***BellSouth Order***, ¶87. And, in ***BellSouth Louisiana II Order,*** the FCC ruled again that, "BellSouth does not demonstrate that it provides nondiscriminatory access to its OSS." ***BellSouth Louisiana II Order,*** ¶92.

In reaching these conclusions, the FCC evaluated the operational readiness of a BOC's OSS functions by considering performance measurements and other evidence of commercial readiness.[5] Specifically, in the absence of evidence of actual commercial usage of OSS functions, the FCC will consider carrier-to-carrier testing, independent third-party testing and internal testing of OSS functionality.[6]

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4 See *Application of Ameritech Michigan Pursuant to § 271 of the Communications Act of 1934, as amended, to Provide In-Region, Inter-LATA Services in Michigan,* FCC Docket No. 97-137, Memorandum Op. and Order (released 8/19/97) at ¶ 136 ("*Ameritech Michigan Order*"). See also, *Application of BellSouth Corporation Pursuant to § 271 of the Communications Act of 1934, as amended, to Provide In-Region, Inter-LATA Services in South Carolina,* FCC Docket No. 97-208, Memorandum Op. and Order (released 12/24/97) at ¶ 96 ("*BellSouth Order*"), See Also *Application of BellSouth Corporation Pursuant to § 271 of the Communications Act of 1934, as amended, to Provide In-Region, Inter-LATA Services in Louisiana,* FCC Docket No. 98-271, Memorandum Op. and Order (released 10/13/98) at ¶¶ 85 ("*BellSouth Louisiana II Order*").

5 *Ameritech Michigan Order,* ¶ 133-43,, *BellSouth Order,* ¶ 96, *BellSouth Louisiana II Order,* ¶85.

6 *Ameritech Michigan Order,* ¶ 138, *BellSouth Order,* ¶ 97, *BellSouth Louisiana II Order,* ¶86.

There is no demonstrated commercial usage of many of U S WEST's OSS functions in Arizona. Hence, the most valuable and indeed likely the only evidence to evaluate U S WEST's OSS compliance is internal or independent testing. U S WEST thus seeks to withhold from production the very kind of documents the FCC has already concluded are central to its ability to determine whether a BOC provides nondiscriminatory access to its OSS functions.

The FCC is not alone in this approach. The New Mexico State Corporation Commission has already endorsed the FCC's approach in a ruling from September of last year regarding the identical data requests at issue in this motion. The New Mexico Commission ordered U S WEST to submit the documents identified on the Privilege Log an for in camera review. In doing so, it forcefully stated:

> Joint Intervenors requests numbers 018, 037, 038, 042, 042 and 074, essentially seek information on all outside consultant and internal testing conducted by or for U S WEST of its OSS interfaces with CLECs. **This information is critically important to the evaluation of U S WEST's Section 271 application. It goes to the heart of whether U S WEST is providing nondiscriminatory access under the 14-point checklist specified in the federal act.** [citations to *Ameritech Michigan Order* and *BellSouth Order* omitted] **Indeed, it may be argued that perhaps the most effective way an informed determination can be made on whether U S WEST is providing nondiscriminatory treatment to its competitors, and providing them with at least the same level of service U S WEST provides itself and its customers is to understand and analyze the U S WEST OSS operations with precisely the type of information that is sought in these discovery requests.** Likewise, it is only U S WEST that has access to the critical information about its own services and the treatment provided its own customers. Therefore, **for this Commission to reach a fully informed decision in this case, it is essential to review documents that analyze U S WEST's OSS operations** and compare the services U S WEST provides itself and its own customers against the service that are provided the CLECs. That is exactly the kind of information these disputed discovery requests seek.[7]

(Order attached as Exhibit B). (Emphasis added)

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[7] *In the Matter of the Investigation Concerning U S WEST Communications, Inc.'s Compliance with Section 271(c) of the Telecommunications Act of 1996,* New Mexico State Corporation Commission, Dckt. 97-106-TC, Order Relating to Outstanding Discovery Motions ("*New Mexico Order*"), ¶¶22-23 (September 21, 1998)

Other state administrative agencies have also concluded that whether a BOC has complied with its duty to provide access to its OSS functions is of paramount concern to the agency's Section 271 review. As recently as April 29, 1999, the Pennsylvania Public Utility Commission approved a plan from Bell Atlantic to permit the testing of its OSS by an independent third party to provide "evidence before this Commission and before the FCC that it [Bell Atlantic] has indeed met its obligations under [Section 271] of TA-96 [Telecommunications Act of 1996]".[8] In the New York, 271 proceedings for Bell Atlantic, the New York Commission, at Bell Atlantic's expense, has publicly sought requests for proposals to retain consultants to develop a plan designed to test Bell Atlantic New York's OSS interfaces to be used by new entrants.[9]

Further, Commission Staff of the California Public Utilities Commission concluded that Pacific Bell Communications does not offer competitors OSS on the same level of mechanization as its retail operations.[10] Commission Staff in California has recommended, "that Pacific and other parties use the collaborative process to develop fixes to Pacific's OSS that will enable Pacific's offering to comply with Sections 251, 252 and 271." (see Footnote 6). Likewise, in Texas, the Commission ordered Southwestern Bell Telephone Company to engage in extensive workshops regarding its OSS. ***Investigation into Southwestern Bell Telephone Company's entry into the Texas InterLATA Telecommunications Market***, Public Utilities Commission of Texas, PUC Project No. 16251, Order No. 25, Adopting Staff Recommendation; Directing Staff to Establish Collaborative Process. Finally, a hearing examiner for Section 271 proceedings for BellSouth in Alabama ordered the production of OSS expert reports. ***In Re:***

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8 See, *In Re: Contract for Evaluation and Testing of Bell Atlantic – PA Operations Support Systems*, Dckt. No. M-00991228, Pennsylvania Public Utility Commission, Order, p. 2, April 29, 1999.

9 The New York Commission's request for proposal is published at its WWW homepage at www.dps.state.nys.us/tel271.htm

BellSouth Telecommunications, Inc.'s Intention to File a Petition for In-region InterLATA Authority with the FCC pursuant to Section 271 of the Telecommunications Act, Alabama Public Service Commission, Proceedings held March 11, 1998. Equally important, an expert witness for BellSouth from Ernst & Young testified extensively regarding such reports in support of BellSouth's alleged compliance with its OSS obligations under the Act. ***Id.***

II. ARGUMENT

A. Attorney-Client Privilege

The attorney-client privilege in Arizona is not unlimited in scope. By statute, in Arizona an attorney "shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment;" A.R.S. §512-2234 (emphasis added). In its seminal decision on the issue, the United States Supreme Court has articulated an identical view on the scope of the privilege. In ***UpJohn v. United States***, 449 U.S. 383, 395-96 (1981), the Supreme Court stated as follows:

> The [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney: "[The] protection of the privilege extends only to communications and not facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question. 'What did you say or write to the attorney? But may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." (citation omitted) (emphasis added)
>
> § 12-2234

In ***Samaritan Foundation v. Goodfarb***, 862 P.2d 870, 875-876 the Appellate Court took a similar approach.

> The privilege does protect disclosure of the communication **but does not protect disclosure of the underlying facts by those who communicate with a lawyer.**

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10 See www.cpuc.ca.gov/telecommunications/271_application/staff_report_final.htm#P45_263

> That is to say, a client who has a duty to disclose facts in discovery or otherwise is not relieved of that duty simply because those same facts have been communicated to a lawyer. **Upjohn notes the distinction well.** ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.") **Clients and their lawyers have and continue to have an obligation to respond truthfully to discovery requests seeking facts within their knowledge.** (emphasis added) (citations omitted).

This limitation on the attorney-client privilege has also been applied in a state regulatory proceeding as to the investigative reports of a BOC. In a case strikingly similar to these proceedings, the Florida Supreme Court affirmed the decision of the Florida Public Service Commission to compel Southern Bell Telephone Company to produce investigative audits. ***Southern Bell Telephone and Telegraph Company v. Deason***, 632 So.2d 1377 (Fla. 1994). In doing so, the Court rejected Southern Bell's attempt to bar production based on attorney-client privilege. The Court held that such audits are simply not communications for purposes of the attorney-client privilege. ***Id.*** at 1384. In ***Southern Bell***, in-house counsel for Southern Bell requested the company's audit department review and analyze certain data from its complex, integrated computer system including, among other functions, the Loop Operations System, Mechanized Out of Service Adjustments and Network Customer Trouble Rate. Asserting attorney-client privilege, Southern Bell refused to produce the resulting investigative audits at the request of public counsel. In affirming the Florida PSC order to produce the audits, the Florida Supreme Court held as follows:

> The PSC and Public Counsel claim that neither the attorney-client privilege nor the work product doctrine protect the investigative audits form disclosure. We find that the audits cannot be classified as a "communication" for the purposes of the attorney-client privilege. The audits consist of systematic analyses of data and cannot be considered the type of statement traditionally protected as a "communication." ***Id.*** (emphasis added)

Quoting ***Southern Bell***, the New Mexico State Corporation Commission reached the same conclusion for the same data requests at issue here. *New Mexico Order,* ¶30.

In the Privilege Log, only 8 of the 25 documents purport to be any form of communication (identified as a letter, email or memorandum) whereas the remaining 17 documents are all identified as either a consultant proposal, agreement, assessment or report touching upon the subject of OSS. For purposes of evaluating whether the attorney-client privilege protects the discovery of consultant reports, assessments, proposals or agreements, ***Southern Bell*** is directly on point. There is simply no principled or substantive distinction between the "systematic analyses of [telephone company] data" and the testing and reports of outside consultants regarding U S WEST's OSS functions. U S WEST does not in fact claim that the reports, assessments or proposals listed in the Privilege Log (or the reports identified in the Fitzsimons affidavit) actually contain any confidential communications between an attorney or client. Because these are not attorney-client communications, they are not protected from disclosure under the attorney-client privilege.

As to the other 8 documents which purport to be a communication of some kind, 6 of these documents are from either Ray Fitzsimons, Esq., Laura Bennett, Esq., Laura Ford, Esq. or Norton Cutler, Esq. One is from an unidentified consultant and the other from a person identified as Robert Van Fossen. The descriptions of each of these 8 documents is so vague that it is not possible to determine whether these communications were made "for the purpose of facilitating legal services and not intended to be disclosed to others."

The two purported communications by Bennett are to a "Dan Burns" (bottom of p. 2 of Privilege Log). U S WEST does not identify Mr. Burns' affiliation. Hence, Joint Intervenors cannot even determine whether it is a communication to a client or an attorney's representative. Moreover, the descriptions of the communications from Bennett are simply too vague to know their purpose, except in the second description by use of the term OSS. U S WEST employs the

phrase "legal advice" in the Bennett descriptions. However, this conclusory description simply begs the question as to the purpose of the alleged communications.

The communications from Ford, Cutler and Van Fossen (p. 4, Privilege Log) are equally as vague. Each communication is a letter ostensibly relating to OSS but beyond that single substantive mark, the descriptions are simply insufficient to conclude the nature of the communication and whether made for the purpose of facilitating legal services.

Even should the Commission conclude that these 8 alleged communications constitute a privileged attorney-client communication, any facts within those communications cannot be shielded behind the cloak of the privilege. A client cannot "refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." ***UpJohn***, 449 U.S. at 396, accord, ***Samaritan Foundation***, 862 P.2d at 875-876. To the extent relevant facts bearing upon the critical issue of U S WEST's compliance with its OSS obligations under the Act are contained in any such communications, the Commission may properly order such facts discharged.

B. Work Product Doctrine

A party seeking to invoke work product protection carries the burden of establishing that the documents were prepared in anticipation of litigation. ***In Re: Pfohl Bros. Landfill Litigation***, 175 F.R.D. 13, 27 (W.D. N. Y. 1997). The Arizona Supreme Court has stated that whether any material is prepared in anticipation of litigation depends upon consideration of the following five factors: (1) the nature of the event that prompted preparation of the materials; (2) whether the materials contain legal analyses or opinions; (3) whether the materials were requested or prepared by the party or its representative; (4) whether such materials are routinely prepared by the party, and (5) the timing of the preparation, particularly with respect to the

assertion of any claims against the party. ***Brown v. Superior Court***, 670 P.2d 725, 733 (1983). Other courts have stated that a document is said to be prepared in anticipation of litigation if, in light of the nature of the documents and the factual situation involved in a particular case, the documents can be fairly said to have been prepared or obtained because of litigation. ***Pfohl Bros.,*** 175 F.R.D. at 27 (citing 8 Wright & Miller, Federal Practice & Procedure, §2024, at p. 198). In other words, the primary motivating purpose behind the creation of the document must be as an aid in litigation. ***United States v. Davis***, 636 F.2d 1028, 1040 (5th Cir. 1981) (also citing Wright & Miller, §2024, at p. 198).

Protection from disclosure requires a more immediate showing than the remote possibility of litigation. ***Pfohl,*** 175 F.R.D. at 13. The litigation must be a real possibility at the time of preparation. ***Id.*** "A litigant must demonstrate the documents were created with a specific claim supported by concrete facts which would likely lead to litigation in mind, not merely assembled in the ordinary course of business or for other nonlitigation purposes." ***Linde Thomson v. RTC***, 5 F.3d 1508 (D.C. Cir. 1993).

> The mere contingency that litigation might result is not determinative. If in connection with an . . . event, a business entity in the ordinary course of business conducts an investigation for its own purposes, the resulting investigatory report is producible in civil pre-trial discovery . . . The fact that a defendant anticipates the contingency of litigation resulting from an . . . event does not automatically qualify an "in-house" report as work product . . . .

Binks. Mfg. Co. v. National Presto Industries, Inc., 709 F.2d 1109, 1119 (7th Cir. 1983). Of equal importance, the mere involvement of an attorney in a client investigation or even the delegation of the responsibility for conducting an investigation to an attorney does not shield the investigation or its results from discovery under the work product doctrine. ***Lumber v. PPG Indus.***, 168 F.R.D. 641, 646 (D. Minn. 1996).

U S WEST cannot satisfy the "in anticipation of litigation" standard. U S WEST has

made no showing whatsoever that any information pertaining to the five factors identified in ***Brown*** would establish that the documents were prepared in anticipation of litigation. On the contrary, the consultant's report and associated documents were not prepared in anticipation of litigation but for an ordinary business purpose unrelated to litigation.

The consultant reports and other documents described in the Privilege Log were prepared for an ordinary business purpose -- the evaluation of whether U S WEST was in compliance with its OSS obligations under the Act and interconnection agreements to which U S WEST is bound. No threatened or pending litigation prompted their preparation. The reports were commissioned almost contemporaneously with the FCC's determination in its ***Ameritech Michigan Order*** and ***BellSouth Order*** that BOCs must provide non-discriminatory access to OSS functions in order to obtain the privilege of providing in-region interLATA service. Moreover, these reports were commissioned within months of the date the FCC rejected U S WEST's request to waive the deadline requirement of January 1, 1997 to provide access to OSS.

There is no showing in the Privilege Log that any of the reports or other documents contain any legal analyses or opinion. Moreover, the Privilege Log does not show who requested the documents. Most of the documents were prepared by the consultants themselves. Finally, there is nothing in the Privilege Log to indicate that any of the reports were prepared with respect to the assertion of any claims against U S WEST.

As U S WEST acknowledges, its obligation to comply with the Act transcends any particular judicial or administrative proceeding. Compliance with the Act is part and parcel of U S WEST's regular and ordinary course of business as a BOC subject to the Act's requirements. In-house investigatory studies advance that obligation and, indeed, a multiplicity of other U S WEST documents also do so. But, if U S WEST does not make such studies

available to the Commission, it impairs the Commission's ability to assess compliance with the Act, which is the central purpose of these proceedings.[11]

Even should the Commission conclude the documents listed in the Privilege Log were prepared in anticipation of litigation, they are still subject to discovery. A party who has a substantial need for work product prepared in anticipation of litigation but who cannot, without undue hardship, obtain the substantial equivalent of the materials by other means is entitled to the work product. Ariz. R. Civ. P. 26(b)(3), ***Southern Bell***, 632 So.2d at 1385.

The New Mexico Commission concluded a showing of substantial need and undue hardship had been made with respect to the same consultant reports identified in the Privilege Log. The New Mexico Commission ruled:

> These showings have been made in this case. The special circumstances of a Section 271 case analysis are unique because they essentially require a comparison of the OSS operations provided to CLECs with the internal OSS that U S WEST provides itself and its customers. Ameritech Michigan Order, FCC 97-137 at ¶¶ 138, 161 The only way this determination can be made is by comparing the two types of services and looking at the data and analysis relevant to each. Only U S WEST has access to this information because only U S WEST has the data about its own operations and customer services with which to make the required comparison. Likewise, only the consultants retained by U S WEST itself would be in the position to have unfettered access to the critically important internal information about the services U S WEST provides itself and its own customers. In those circumstances, the requesting party and all intervenors granted access to the same information **do have a substantial need for the reports and they are unable to obtain any substantially equivalent information by other means without undue hardship.** There simply is no other realistic way to obtain the relevant facts about U S WEST's internal operations, and without these the required comparisons cannot be made. (emphasis added).

New Mexico Order, ¶34.

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[11] The fact that U S WEST has the burden to demonstrate such compliance to this Commission or to another administrative or judicial body does not mean *ipso facto* that every document U S WEST prepares for that purpose is done so in anticipation of litigation. If that were the case, U S WEST could, as it has apparently attempted to do with the consultant reports or other documents listed in the Privilege Log, cloak every document it creates in connection with its obligation to comply with the Act in a shroud of secrecy. As U S WEST views the matter, it need only attach the appropriate label to the document and ensure that in-house or other counsel is involved in its preparation.

In ***Southern Bell***, the company also refused to turn over its investigative audits on grounds that they were work product subject to protection. While the Florida Supreme Court acknowledged the documents were work product (Public Counsel demanded their preparation as part of an on-going PSC investigation), the Court nonetheless held they were still subject to production because it would cause undue hardship to replicate the effort:

> Public Counsel and the PSC contend the audits are not obtainable from any other source because the information cannot be duplicated without the use of Southern Bell's complex, integrated computer system. Southern Bell points out that the audits are "analyses of information: and that Public Counsel is entitled to analyze the underlying data on which the audits are based. The underlying data consists, in part, of over 1,000,000 trouble repair reports. Although we agree with Southern Bell that it is possible to replicate the information, the standard for producing work product is not whether the replication effort is possible, but whether it causes undue hardship. We find that it would be an unduly arduous and unrealistic task to expect any party, regardless of their resources, to be able to analyze such an enormous amount of information. This is precisely the type of situation that the "undue hardship" qualification in rule 1.280(b)(3) [identical Florida counterpart to Nebraska Rule 26(b)(3)] envisioned.

Southern Bell, 632 So.2d at 1385 (emphasis added).

Moreover, the ***New Mexico Order*** is on all fours with this proceeding. The exact reports were at issue there. U S WEST should not be allowed to withhold disclosure of these reports in these proceedings only to disclose them later to the FCC. Indeed, on July 14, 1998, U S WEST entered into a joint stipulation and agreement with Commission staff in Colorado proceedings regarding the investigation of U S WEST's OSS. In that stipulation, U S WEST agreed to provide the Colorado Commission with U S WEST internal system tests results and system test results and certifications made by third party vendors regarding select OSS functionality.

Given the extremely complex nature of OSS functions as well as the quantity of data that must be analyzed to properly evaluate compliance, it would indeed be an arduous and unrealistic task to require Joint Intervenors to replicate that effort. U S WEST should not be permitted to

pass on that obligation to Joint Intervenors when the data has already been collected and analyzed. In addition, quite unlike the situation in ***Southern Bell*** where it was at least possible for Public Counsel to replicate the audit effort, here it is not even possible to replicate the effort in the first instance. Joint Intervenors have not been offered access to U S WEST's OSS capability nor the cooperation of U S WEST employees that is at least equal to that afforded to U S WEST's own consultant's. Moreover, from a practical standpoint, even if access were granted, Joint Intervenors could not duplicate the activities of the U S WEST consultants. These consultants were retained during the very early development of U S WEST's OSS interface (IMA). The same technical conditions which existed then are no longer available to another expert for independent evaluation.

U S WEST is required to provide non-discriminatory access to OSS functionality. As the FCC has concluded already on numerous instances, to obtain the privilege under the Act of providing interLATA service within its territory, the burden rests squarely (and only) upon U S WEST to demonstrate that it has fulfilled its OSS obligations under the Act. To therefore withhold from production the very evidence which bears most directly on the central issues raised by the case and instead demand, as U S WEST does in these proceedings, that others carry the burden of proving non-compliance borders on the absurd.

III. CONCLUSION

Joint Intervenors request the following relief:

1. Its motion to compel should be granted as to the following data requests:

   JI-130, JI-131, JI-132, JI-133.

2. That U S WEST be ordered produce a privilege log for JI-3 within three days of entry of an order on this motion or be deemed to have waived any objections to JI-3 if it fails to do so.

3. Alternatively, should the Hearing Examiner conclude it is unable to determine whether the documents and other information U S WEST seeks to withhold from discovery do not fall within the scope of the attorney-client privilege or work product doctrine, Joint Intervenors request the Hearing Examiner:

A. Order U S WEST to produce the documents to the Hearing Examiner and Commission staff for inspection on an *in camera* basis; and

B. After the *in camera* review and issuance of a staff report and recommendation ("Report") that the parties be granted leave to file written comments to the Report; and

C. The Hearing Examiner hold oral argument before rendering its decision.

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ORIGINAL AND TEN COPIES of the foregoing
hand-delivered for filing on May 17, 1999, to:

Docket Control
Arizona Corporation Commission
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Phoenix, AZ 85007

ONE COPY of the foregoing
hand-delivered on May 17, 1999, to:

Mr. Jerry Rudibaugh
Chief Hearing Officer
Hearing Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

COPY of the foregoing mailed on May 17, 1999, to:

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EXHIBIT A

Arizona
Docket No. T-00000B-97-0238
ATMS 01-130

INTERVENOR: AT&T of the Mountain States, Inc., TCG Phoenix, MCI WorldCom, Inc. and Sprint Communications Company, Joint Intervenors

REQUEST NO: 130

RE: OSS
Witness: Dean W. Buhler

State whether U S WEST has retained any outside consultants, or any other independent third party, to study, evaluate, or analyze the performance of its interfaces and/or the access that U S WEST provides to its operations support systems for CLECs. If your answer is yes:

(a) identify the consultant(s);

(b) state the date agreement was reached with U S WEST for the consultant(s) to
undertake the project;

(c) state the proposed and actual beginning and ending dates of the review as a
whole, and of each area of inquiry; and

(d) describe what was done, any concerns, problems, deficiencies, recommendations or areas that need improvement that the consultant(s) have identified with respect to U S WEST's interfaces or OSSs including but not limited to concerns, problems, deficiencies, or areas that need improvement with respect to (1) capacity, (2) parity of access for CLECs, (3) testing, (4) mechanization of interfaces, (5) manual intervention, (6) human error, (7) performance measurement, (8) speed, (9) quality, and (10) ease of use.

RESPONSE:

U S WEST objects to this data request to the extent it requests the production of documents protected by the attorney-client privilege, the work product doctrine, and the self-evaluation privilege.

SUPPLEMENTAL RESPONSE 05/07/99:

The Privilege Log is provided as Attachment A.

Respondent: Legal Department

Arizona
Docket No. T-00000B-97-0238
ATMS 01-131

INTERVENOR: AT&T of the Mountain States, Inc., TCG Phoenix, MCI WorldCom, Inc. and Sprint Communications Company, Joint Intervenors

REQUEST NO: 131

RE: OSS
Witness: Dean W. Buhler

Produce all documents that refer or relate to any consultant review identified in response to the preceding data request, including, but not limited to: (1) any documents which contain or set forth the scope of the consultant(s)' review; (2) all correspondence and any agreements constituting, evidencing or reflecting the consultant(s)' retention and the terms of that retention by U S WEST; (3) all documents constituting, evidencing, or reflecting the consultant(s)' work plans for review, whether those plans were actually carried out or not; (4) all documents, information, and materials (whether paper, electronic, or any other form) that the consultant(s) have reviewed, considered, or relied upon in, connection with this project, all work product (whether written, electronic, or any other form) prepared by the consultant(s) in connection with this project, including any and all analyses, memos, notes, interview notes, indices, summaries, logs; (5) all other types of work product, including, but not limited to, drafts or any preliminary reports in any form; and (6) any documents that relate to the problems, deficiencies, recommendations, or areas that need improvement identified by the consultant(s).

RESPONSE:

U S WEST objects to this data request to the extent it requests the production of documents protected by the attorney-client privilege, the work product doctrine, and the self-evaluation privilege.

SUPPLEMENTAL RESPONSE 05/07/99:

See response to Request No. 130.

Respondent: Legal Department

Arizona
Docket No. T-00000B-97-0238
ATMS 01-132

INTERVENOR: AT&T of the Mountain States, Inc., TCG Phoenix, MCI WorldCom, Inc. and Sprint Communications Company, Joint Intervenors

REQUEST NO: 132

RE: OSS
Witness: Dean W. Buhler

State whether U S WEST has retained any outside consultants, or any other independent third party, to study, evaluate, or analyze the performance of its service centers responsible for processing orders and arranging provisioning of local service for CLECs and CLEC customers? If your answer is yes:

(a) identify the consultant(s);

(b) state the date agreement was reached with U S WEST for the consultant(s) to undertake the project;

(c) state the proposed and actual beginning and ending dates of the review as a whole, and of each area of inquiry; and

(d) describe the testing and any concerns, problems, deficiencies, recommendations or areas that need improvement that the consultant(s) have identified with respect to U S WEST's interfaces or OSSs including but not limited to concerns, problems, deficiencies, or areas that need improvement with respect to (1) capacity, (2) parity of access for CLECs, (3) testing, (4) mechanization of interfaces, (5) manual intervention, (6) human error, (7) performance measurement, (8) speed, (9) quality, and (10) ease of use.

RESPONSE:

U S WEST objects to this data request to the extent it requests the production of documents protected by the attorney-client privilege, the work product doctrine, and the self-evaluation privilege.

SUPPLEMENTAL RESPONSE 05/07/99:

See response to Request No. 130.

Respondent: Legal Department

Arizona
Docket No. T-00000B-97-0238
ATMS 01-133

INTERVENOR: AT&T of the Mountain States, Inc., TCG Phoenix, MCI WorldCom, Inc. and Sprint Communications Company, Joint Intervenors

REQUEST NO: 133

RE: OSS
Witness: Dean W. Buhler

Produce all documents that refer or relate to any consultant review identified in response to the preceding data request, including, but not limited to: (1) any documents which contain or set forth the scope of the consultant(s)' review; (2) all correspondence and any agreements constituting, evidencing or reflecting the consultant(s)' retention and the terms of that retention by U S WEST; (3) all documents constituting, evidencing, or reflecting the consultant(s)' work plans for review, whether those plans were actually carried out or not; (4) all documents, information, and materials (whether paper, electronic, or any other form) that the consultant(s) have reviewed, considered, or relied upon in connection with this project, all work product (whether written, electronic, or any other form) prepared by the consultant(s) in connection with this project, including any and all analyses, memos, notes, interview notes, indices, summaries, logs; (5) all other types of work product, including, but not limited to, drafts or any preliminary reports in any form; and (6) any documents that relate to the problems, deficiencies, recommendations, or areas that need improvement identified by the consultant(s).

RESPONSE:

U S WEST objects to this data request to the extent it requests the production of documents protected by the attorney-client privilege, the work product doctrine, and the self-evaluation privilege.

SUPPLEMENTAL RESPONSE 05/07/99:

See response to Request No. 130.

Respondent: Legal Department

Arizona Docket No. U-0000-97-238
List of Privileged Documents for U S WEST, Inc.

Regarding Interrogatory Number	Author	Addressee	Other Recipients	Date of Document	Nature of Privilege	Description/Purpose
ATT-018, 074, 037, 038, 041, 042	Consultant A	Ray Fitzsimons, Esq.	Robert H. VanFossen	7/14/97	WP AC SC	OSS Assessment Approach Overview
ATT-018, 074, 037, 038, 041, 042	Consultant A	Laurie Bennett, Esq.	N/A	8/1/97	WP AC SC	Consultant A proposal for OSS Assessment at U S WEST
ATT-018, 074, 037, 038, 041, 042	Consultant A	Laurie Bennett, Esq.	N/A	8/4/97	WP AC SC	Consultant Agreement for OSS assessment between Consultant A and U S WEST, Inc.
ATT-018, 074, 037, 038, 041, 042	Consultant A	Laurie Bennett, Esq.	Laura Ford, Esq. Dan F. Burns	9/97	WP AC SC	OSS Assessment
ATT-018, 074, 037, 038, 041, 042	Consultant B	Ray Fitzsimons, Esq.	Robert H. VanFossen	10/97	WP AC SC	OSS Assessment

WP - attorney work product
AC - attorney client privilege
SC - attorney self critical corporate analysis privilege

Regarding Interrogatory Number	Author	Addressee	Other Recipients	Date of Document	Nature of Privilege	Description/Purpose
ATT-018, 074, 037, 038, 041, 042	Consultant C	Ray Fitzsimons, Esq.	Robert H. VanFossen Teresa Jacobs	10/97-7/98	WP AC SC	Various weekly E-mail status reports regarding OSS assessment.
ATT-018, 074, 037, 038, 041, 042	Consultant C	Ray Fitzsimons, Esq.	N/A	10/6/97	WP AC SC	Consultant C's proposal to conduct review OSS assessment at direction of Law Department.
ATT-018, 074, 037, 038, 041, 042	Ray Fitzsimons, Esq.	Consultant C	N/A	10/8/97	WP AC SC	Letter and executed copy of proposal for consultant C to conduct OSS assessment at Law Department's direction.
ATT-018, 074, 037, 038, 041, 042	Consultant C	Ray Fitzsimons, Esq.	Robert H. VanFossen	11/5/97	WP AC SC	OSS Assessment Project Status Discussion
ATT-018, 074, 037, 038, 041, 042	Consultant C	Ray Fitzsimons, Esq.	Robert H. VanFossen	11/12/97	WP AC SC	OSS Assessment
ATT-018, 074, 037, 038, 041, 042	Laurie Bennett, Esq.	Dan Burns	Sue Parks Dan Poole, Esq.	12/5/97	AC WP SC	Letter to Bennett requesting legal advice for Sue Parks regarding U S WEST
ATT-018, 074, 037, 038, 041, 042	Laura Bennett, Esq.	Dan Burns	Sue Parks Dan Poole, Esq.	12/8/97	AC WP SC	Memo to Dan Burns indicating Sue Parks' request for legal advice regarding OSS and regarding assistance of Dan Burns and Consultant A in developing legal advice and indicating retention of Consultant A for said review and advice.

Regarding Interrogatory Number	Author	Addressee	Other Recipients	Date of Document	Nature of Privilege	Description/Purpose
ATT-018, 074, 037, 038, 041, 042	Consultant A	Laurie Bennett, Esq.	Dan F. Burns	1/98	WP AC SC	Review of Operational Support Systems
ATT-018, 074, 037, 038, 041, 042	Consultant A	Laurie Bennett, Esq.	Dan F. Burns	2/6/98	WP AC SC	Preliminary Assessment Design for OSS.
ATT-018, 074, 037, 038, 041, 042	Consultant C	Ray Fitzsimons, Esq.	Robert H. VanFossen	2/10/98	WP AC SC	OSS Assessment Interim Review
ATT-018, 074, 037, 038, 041, 042	Consultant C	Laura Ford, Esq.	Robert H. VanFossen Ray Fitzsimons, Esq.	2/18/98	WP AC SC	OSS Assessment Project Status Discussion
ATT-018, 074, 037, 038, 041, 042	Consultant A	Dan F. Burns	Laurie Bennett, Esq.	3/6/98	WP AC SC	Review of Operational Support Systems
ATT-018, 074, 037, 038, 041, 042	Ray Fitzsimons, Esq.	Consultant C	N/A	3/13/98	WP AC SC	Letter and Project change request also indicating continuing work at Law Department's direction.

Regarding Interrogatory Number	Author	Addressee	Other Recipients	Date of Document	Nature of Privilege	Description/Purpose
ATT-018, 074, 037, 038, 041, 042	Consultant C	Ray Fitzsimons, Esq.	Robert H. VanFossen	3/18/98	WP AC SC	OSS Assessment Project Status Discussion
ATT-018, 074, 037, 038, 041, 042	Consultant C	Laura Ford, Esq.	Robert H. VanFossen Ray Fitzsimons, Esq.	4/22/98	WP AC SC	OSS Assessment Project Status Discussion
ATT-018, 074, 037, 038, 041, 042	Laura Ford, Esq.	Consultant C	Robert H. VanFossen Teresa Jacobs	5/12/98	WP AC SC	Letter regarding final report on OSS for litigation purposes. Also notes Norton Cutler, Esq. And Kevin Pernell, Esq. As attorneys directing work.
ATT-018, 074, 037, 038, 041, 042	Consultant C	Laura Ford, Esq.	Robert H. VanFossen Ray Fitzsimons, Esq.	5/14/98	WP AC SC	OSS Assessment Project, Final Report
ATT-018, 074, 037, 038, 041, 042	Consultant C	Laura Ford, Esq.	Robert H. VanFossen Ray Fitzsimons, Esq.	5/19/98	WP AC SC	OSS Assessment
ATT-018, 074, 037, 038, 041, 042	Norton Cutler, Esq.	Consultant C	N/A	6/2/98	WP AC SC	Letter requesting Consultant A's continued work at the Law Department's direction regarding OSS
ATT-018, 074, 037, 038, 041, 042	Robert H. VanFossen	Laura Ford, Esq. Ray Fitzsimons, Esq.	Robert. H. VanFossen	6/23/98	WP AC SC	Cover letter forwarding copy of OSS Assessment dated 10/97

EXHIBIT B

Steele, III

STATE CORPORATION COMMISSION
FILED
'98 SEP 21 PM 1 18

BEFORE THE NEW MEXICO STATE CORPORATION COMMISSION

IN THE MATTER OF THE INVESTIGATION CONCERNING U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996

DOCKET NO. 97-106-TC

ORDER RELATING TO OUTSTANDING DISCOVERY MOTIONS

THESE MATTERS came before the New Mexico State Corporation Commission ("SCC" or the "Commission") on numerous discovery motions, objections, and related memoranda that have been filed in response thereto. This docket was initiated by the Commission on its own motion and pursuant to its Order filed March 14, 1997. U S West Communications, Inc. ("U S WEST") on June 5, 1998, filed its Notice of Intention to File Section 271(c) Application with the FCC and Request for Commission to Verify U S WEST Compliance with Section 271(c) of the Telecommunications Act of 1996.[1] ("U S WEST 271 Application") Hearings are scheduled to begin on October 1, 1998. There follows a brief summary of the pending discovery motions before the Commission that require decision at this time.

AT&T Communications of the Mountain States, Inc., ("AT&T") served its First Set of Data Requests on U S WEST on July 6, 1998. On July 11, 1998 U S WEST filed its objections to AT&T 's first set of data requests. On July 14, 1998, U S WEST filed its First Set of Data Requests to AT&T, MCI Telecommunications Corporation ("MCI"), Brooks Fiber Communications of New Mexico, Inc. ("Brooks Fiber"), ACSI Local Switched Services, Inc.

[1] 47 U.S.C. § 271, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act) *codified at* 47 U.S.C. §§ 151

d/b/a e.spire Communications ("e.spire"), and Sprint[2]. On July 16, 1998 AT&T filed a Motion to Compel Responses to Discovery by U S WEST. On July 17, 1998 e.spire and Brooks Fiber filed a Joint Motion for Protective Order "relieving them from their obligation to respond to the burdensome and oppressive" nature of all of U S WEST's discovery requests. Also, AT&T moved to quash U S WEST's first set of data requests on July 21, 1998.

U S WEST filed its Response to AT&T's Motion to Compel on July 22, 1998 while Brooks Fiber and MCI filed their objections and responses to U S WEST's first set of data requests. Then on July 23rd U S WEST moved to compel responses to its first set of data requests. The Commission then filed its Notice of Hearing and Procedural Order on Joint Motion for Protective Order and AT&T's Motion to Quash wherein responses of e.spire, Brooks Fiber, and AT&T to U S WEST's first set of data requests were held in abeyance.

On July 24, 1998 the Commission filed its Order on AT&T's Motion to Compel Responses to Discovery by U S WEST in which we directed U S WEST to respond to all of AT&T's requests that had not been objected to on grounds that they were privileged. For documents or communication which U S WEST claimed were privileged, we directed U S WEST to provide a privilege log for those materials.

On July 30, 1998 U S WEST filed its Response to AT&T's Motion to Quash and Motion to Compel Responses to Discovery. That same day U S WEST also filed its Response to Joint Motion for Protective Order and Motion to Compel Answers to Data Requests Served on e.spire, Brooks Fiber, and MCI. On July 31, 1998 U S WEST filed the Privilege Log as we requested in our July 24th Order.

[2] Discovery requests were also filed with LCI International Telecom Corp. and GST Telecom New Mexico, Inc., intervenors that have withdrawn from this docket. *See*, Orders filed on July 17 and July 20, 1998, respectively.

On August 3rd MCI filed its response to U S WEST's motion to compel. And on August 6, 1998 AT&T filed its Supplemental Memorandum in Support of Its Motion to Compel Responses to Discovery by U S WEST. Then, on August 12, 1998 AT&T filed a response to U S WEST's motion to compel discovery. On August 18th U S WEST responded to AT&T's Supplemental Memorandum that was filed on August 6th.

On August 21, 1998 U S WEST filed its Motion to Set Pending Discovery Motions for Hearing. And on August 24th e.spire filed its Reply to U S WEST's Response to Joint Motion for Protective Order and Motion to Compel Responses. On September 11, 1998 U S WEST filed a Renewed Motion Requesting a Hearing and Oral Argument and Supplemental Memorandum in Support of Motions to Compel ("U S WEST's Renewed Motion"). On September 17, 1998 AT&T filed its Response to U S WEST's Renewed Motion.

The Commission having considered the filings described above, and otherwise being fully advised, FINDS, CONCLUDES, AND ORDERS:

PROCEDURAL BACKGROUND – FINDINGS OF FACT

1. Through this proceeding, U S WEST begins the process to seek approval, pursuant to the federal Telecommunications Act of 1996 ("federal act"), to provide interLATA or long-distance services originating from New Mexico.

2. The Federal Communications Commission ("FCC") must act within ninety days on any application U S WEST files seeking this approval. *See* Section 271(d)(3) of the federal act. Before making its determination, the FCC must consult with the Commission to ascertain whether U S WEST meets the requirements specified in Section 271[3] that are the prerequisites for being allowed entry into the interLATA market for calls originating in New Mexico. *See*

Section 271(c)(2)(B) of the federal act, which lists the 14-point checklist criteria that must be reviewed.

3. U S WEST has stated in its application that it plans to seek Section 271 approval pursuant to the provisions of Section 271(c)(1)(A) of the federal act. U S WEST 271 Application at 1. This is what is termed a "Track A" request.[4] It requires that U S WEST prove that "it has entered into one or more binding agreements that have been approved under section 252 . . . [of the federal act] . . . specifying the terms and conditions under which the . . . company [U S WEST] is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers. . . ." Section 271(c)(1)(A) of the federal act.

4. The unaffiliated competing providers that U S WEST asserts it has entered into such binding agreements with are Brooks Fiber, e.spire and GST, which are also referred to as the "facilities-based Competing Local Exchange Companies" ("facilities-based CLECs"). *See*, U S WEST 271 Application at 15 and 17.

5. The Commission has adopted procedural rules to govern Section 271 applications. Procedural Order filed July 11, 1997. This proceeding is being conducted pursuant to those procedures. They include expedited filing requirements so the Commission can respond promptly and on an informed basis to the FCC when it conducts its 90 day review and the required consultation with this Commission pursuant to Section 271 of the federal act. *Id.*

[4] Section 271(c)(1) of the federal act provides two tracks for an RBOC, or Regional Bell Operating Company, to demonstrate that its local market is open to competition, Track A and Track B. In contrast to a Track A request, qualification under Track B would permit an RBOC, like U S WEST, to enter the interLATA market in its region

6. As noted above, a number of discovery motions have been filed in this proceeding. Hearings are scheduled to begin on October 1, 1998, and the discovery motions need to be resolved for the case to proceed on schedule. The purpose of this Order is to resolve the pending discovery disputes.

7. As for discovery that AT&T is seeking from U S WEST, the issues before the Commission have been simplified because U S WEST has agreed to "produce all documents responsive to the remaining 22 discovery requests" referenced in the Commission's July 24, 1998 Order. *See*, U S WEST's Response to AT&T's Supplemental Memorandum in Support of Its Motion to Compel Discovery by U S WEST, filed August 18th, ("U S WEST 8/18 Response"). Therefore, the only issue remaining before the Commission relating to AT&T's July 16th motion to compel is whether the 25 documents listed on the Privilege Log[5] supplied by U S WEST in response to our July 24th Order are discoverable.

8. The remaining 25 documents that U S WEST seeks to shield from discovery relate to six of AT&T's data requests (Request Nos. 018, 037, 038, 041, 042, and 074). U S WEST maintains that the information sought in those requests is protected by the attorney-client privilege and the attorney work-product doctrine because the documents are expert reports commissioned by U S WEST attorneys for the purpose of evaluating U S WEST's compliance with the 14-point check-list and, therefore, they are documents prepared in anticipation of litigation that contain mental impressions of U S WEST's attorneys. U S WEST also argues that the documents are

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even if no unaffiliated competing provider has requested access and interconnection to network elements provided by the RBOC pursuant to the federal act and FCC Rules.

[5] The Privilege Log is Confidential and will not be attached to this order.

"immune" from discovery because they were prepared by non-testifying experts who were retained in anticipation of litigation and that, in the alternative, they are protected from discovery under the "corporate self-evaluation privilege." *See*, U S WEST 8/18 Response at 2.

9. AT&T, in its Supplemental Memorandum in Support of Its Motion to Compel Responses to Discovery by U S WEST, filed August 6, 1998, ("AT&T Supplemental Memorandum"), argues that 20 of the 25 documents are discoverable because they are central to the determination of whether an Incumbent Local Exchange Carrier ("ILEC") provides nondiscriminatory access to OSS functions and meets the requirements of Section 271, including the 14 point checklist. AT&T argues that some of the documents which U S WEST describes as expert reports commissioned by U S WEST attorneys to evaluate U S WEST's compliance with the 14-point checklist are not protected by the attorney-client privilege because they do not represent communications made for the purpose of facilitating the rendition of professional legal services. Furthermore, AT&T asserts that although the attorney-client privilege insulates communications from disclosure, it does not protect the disclosure of underlying facts that are communicated to the attorney. AT&T also argues that the attorney work-product doctrine is inapplicable because the documents were investigations for U S WEST's own purposes that were prepared in the ordinary course of business and that the documents are not otherwise obtainable through other means without undue hardship.

10. AT&T argues that, according to the Privilege Log, only eight of the documents that AT&T would compel U S WEST to disclose are some form of communication. The other seventeen documents consist of proposals, agreements or assessments or reports regarding the OSS. AT&T asserts that six of the eight communications, as they are described on the Privilege Log, do not sufficiently describe the function of the attorney who is party to the document.

AT&T also contends that one of the remaining documents is not privileged because the communications were made by an attorney who was acting in his capacity as a businessperson rather than as counsel. AT&T Supplemental Memorandum at 12 and 13.

11. U S WEST has also sought discovery from the CLECs that are parties to this proceeding. The facilities-based CLECs, Brooks Fiber, and e.spire, as well as the non-facilities-based CLECs, AT&T, MCI, and Sprint, seek blanket protection from U S WEST's discovery requests. AT&T did not deny U S WEST's right to discovery in this proceeding but objected to the discovery requests on the basis of their timing and because the requests seek disclosure of proprietary information. Brooks Fiber, e.spire, and MCI objected on grounds that U S WEST's discovery requests seek production of information that is irrelevant to this proceeding or is unlikely to lead to the discovery of admissible evidence. Joint Motion for Protective Order, July 17, 1998. MCI responded to some of U S WEST's discovery requests and challenged others as being irrelevant, "burdensome" and improper to the extent that some requests seek disclosure of proprietary information. MCI Response to Motion to Compel, filed August 3, 1998.

12. U S WEST argues that its discovery requests are relevant because they seek information relating to AT&T's experience in ordering and provisioning of U S WEST's services and whether AT&T intends to enter the local phone market. U S WEST's Response to AT&T's Motion to Quash and Motion to Compel Discovery, filed July 30, 1998.

13. U S WEST also denies the challenges raised by Brooks Fiber, e.spire, and MCI in their Joint Motion for Protective Order on grounds that U S WEST is entitled to information relating to their ability to order and provision U S WEST's services. U S WEST's Response to

Joint Motion for Protective Order and Motions to Compel Answers to Data Requests served on e.spire, Brooks Fiber and MCI, filed July 301, 1998.

14. AT&T and MCI have responded to some of U S WEST's discovery requests, but refused to respond to others.

15. Upon consideration of the foregoing, the Commission finds that briefing of these issues is adequate and that these discovery disputes can be most efficiently resolved without a hearing.

CONCLUSIONS OF LAW

16. Since U S WEST initiated this proceeding, it bears the burden of proof. "The fundamental principle is that the burden of proof in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue." *In the Matter of ISDN*, No. 23,856, slip op. at 16 (N.M. S. Ct. September 15, 1998) (internal citations omitted), *quoting from Penecost v. Hudson*, 57 N.M. 7, 9, 252 P.2d 511, 512 (1953).

17. Section 271 places on the applicant, U S WEST, the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied. *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934 as Amended, To Provide In-Region, InterLata Services In Michigan*, CC Docket 97-137 Memorandum and Order, (Released August 19, 1997) at ¶ 43 ("*Ameritech Michigan* FCC 97-137"); *In the Matter of the Application of BellSouth Corporation Pursuant to Section of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208. Memorandum Opinion and Order, (Released December 24, 1997). ("*BellSouth South Carolina* FCC 97-208").

18. The 14-point competitive checklist set forth in Section 271(c)(2)(B) of the federal act requires review of more than simply the terms in the interconnection agreements. Much of the focus of the 14-point checklist is on whether the applicant, U S WEST, is providing nondiscriminatory access and services to the CLECs. *Ameritech Michigan* FCC 97-137 at ¶ 131. This includes nondiscriminatory access to network elements; nondiscriminatory access to specified equipment and rights-of-way; nondiscriminatory access to 911, directory assistance and operator call completion services; nondiscriminatory access to telephone numbers for assignments; nondiscriminatory access to data bases for call routing and completion; and nondiscriminatory access to services or information to implement local dialing parity. *See Ameritech Michigan* FCC 97-137 at ¶ 132.

19. Nondiscriminatory treatment in the context of a Section 271 case review means proving that each CLEC is provided at least the same access and treatment that the Bell operating company, in this case U S WEST, provides to its own operations and customers. *See*, Section 271(c)(2)(B)(i), which requires interconnection pursuant to Section 251(c)(2), which in turn specifies that the BOC's duty is to provide interconnection "that is at least equal in quality to that provided by the [BOC] to itself or to . . . any other party." Furthermore, "[f]or those OSS functions provided to competing carriers that are analogous to OSS functions that a BOC provides to itself in connection with retail service offerings, the BOC must provide access to competing carriers that is equal to the level of access that the BOC provides to itself, its customers or its affiliates, in terms of quality, accuracy and timeliness." *Ameritech Michigan* FCC 97-137 at ¶ 141; *Iowa Utilities Bd v. FCC.*, 120 F.3d 753, 812, *cert.granted*, - U.S. -, 118 S.Ct. 879, 139 L.Ed.2d 867 (1998).

20. The discovery motions pending in this proceeding can be analyzed in two different categories: (a) the discovery sought from U S WEST by AT&T as to which U S WEST objects by asserting that the remaining 25 documents in dispute are privileged and confidential and should not be disclosed; and (b) the discovery that U S WEST seeks from the intervenor CLECs.

A. AT&T'S DISCOVERY REQUESTS OF U S WEST

21. As noted above, the remaining discovery dispute between AT&T and U S WEST revolves around six requests and whether three consultant reports and the 25 documents or communications relating to them are immune from discovery. *See*, U S WEST 8/18 Response at 4.

22. The six requests, AT&T request numbers 018, 037, 038, 041, 042 and 074, essentially seek information on all outside consultant and internal testing conducted by or for U S WEST of its OSS interfaces with CLECs. This information is critically important to the evaluation of U S WEST's Section 271 application. It goes to the heart of whether U S WEST is providing nondiscriminatory access under the 14-point checklist specified in the federal act. *See*, Section 271(c)(2)(B); *Ameritech Michigan FCC* 97-137 at ¶ 137; *BellSouth South Carolina* FCC 97-208 at ¶¶ 103 and 118 (recognizing essential nature of having evidence on ILEC's internal operations for purposes of making relevant comparisons to services provided to CLECs.)

23. Indeed, it may be argued that perhaps the most effective way an informed determination can be made on whether U S WEST is providing nondiscriminatory treatment to its competitors, and providing them with at least the same level of service U S WEST provides itself and its own customers, is to understand and analyze the U S WEST OSS operations with

precisely the type of information that is sought in these discovery requests. Likewise, it is only U S WEST that has access to the critical information about its own services and the treatment provided its own customers. Therefore, for this Commission to reach a fully informed decision in this case, it is essential to review documents that analyze U S WEST's OSS operations and compare the services U S WEST provides itself and its own customers against the services that are provided the CLECs. That is exactly the kind of information these disputed discovery requests seek.

24. Despite the relevance of the requests, U S WEST argues that the three consultant reports in dispute, and the communications relating to them, are immune from discovery because of "the attorney-client privilege, the attorney work-product doctrine, the prohibition of discovery of materials prepared by non-testifying experts, and the self-evaluation privilege." U S WEST 8/18 Filing at p. 2.

25. The attorney-client privilege and the attorney work-product doctrine are often thought of as closely related and analyzed jointly.

26. The attorney-client privilege protects the confidentiality of and seeks to encourage "full and frank communication communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). See State v. Valdez, 95 N.M. 70 (N.M. 1980). U S WEST correctly notes, and the United States Supreme Court recently confirmed, "the attorney-client privilege is one of the law's oldest and most venerable privileges." *See,* Swidler & Berlin v. United States, 118 S.Ct. 2081 (1998); U S WEST 8/18 Response at 9. It protects the critically important and direct relationship between the attorney and the client.

27. However, "[t]he attorney-client privilege only applies to communications between the attorney and the client . . ., [and] [t]he underlying facts of an action are not protected by the attorney-client privilege." 6 Moore's Federal Practice, Section 26.49[1] at (1997 Ed.). "In addition, the privilege does not extend to information and statements obtained by an attorney from . . . third persons." Wright, Miller & Marcus, Federal Practice and Procedure, Section 2017 (1994 Ed.).

28. The attorney work-product doctrine has been succinctly summarized as follows:

> [A] party may not obtain discovery of documents or other tangible things prepared in anticipation of litigation or trial by or for another party or that other party's representative, unless the party seeking discovery (1) has substantial need of the materials in the preparation of his or her case, and (2) the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Moreover, in ordering discovery of such materials when the required showing has been made, the court must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." 6 Moore's Federal Practice, Section 26.70[1] (1997 Ed.).

See, Hickman v. Taylor, 329 U. S. 495 (1947). And, as with the attorney-client privilege, the work-product doctrine "does not protect facts concerning the creation of work-product, or facts contained within work-product." 6 Moore's Federal Practice at Section 26.70[2][a].

29. U S WEST's affidavits emphasize that the three consultant reports were prepared at the direction and under the supervision of in-house attorneys. Bennett Affidavit attached to U S WEST 8/18 filing; Fitzsimons Affidavit attached to U S WEST's Response to AT&T' Motion to Compel filed July 21, 1998. The U. S. Supreme Court decided in the leading Upjohn case that communications with in-house attorneys should be entitled to the same protections under the attorney client privilege as communications with outside counsel.

Upjohn, 449 U. S. at 389-390. There may be some confusion about whether the U S WEST employees here were acting as attorneys or in other capacities as corporate employees. U S WEST's Response to AT&T' Motion to Compel filed July 21, 1998, Fitzsimons Affidavit at ¶ 2. In any event, it is undisputed that the three consultant reports in question were not prepared directly by corporate employees. They were prepared by outside third parties under contract with U S WEST. As such, the communications made may not be accurately characterized as direct and privileged attorney-client communications.

30. Reports prepared by experts, though they may be commissioned by an attorney acting in his capacity as a counselor, do not constitute privileged "communications" to the extent that they "consist of systematic analyses of data and cannot be considered the type of statement traditionally protected as a 'communication.'" *Southern Bell Telephone and Telegraph Co.*, 632 So.2d 1377, 1384 (Fla. 1994). Furthermore, as noted above, even to the extent the documents are attorney-client communications, underlying relevant facts in those document should be disclosed.

31. U S WEST nevertheless asserts that as professionals who were assisting attorneys in developing information in anticipation of litigation, the work of these consultants should be protected absolutely under the attorney-client privilege. Assuming without deciding that the consultant reports fall within the attorney-client privilege, it still remains to be determined whether the reports contain underlying relevant facts that should be disclosed. This determination requires an in camera review of the documents. *See, Schein v. No. Rio Arriba Elec. Co-op. Inc.*, 122 N.M. 800, 806, 932 P.2d 490, 496 (1997); *Fed. Deposit Ins. Corp. v. United Pac. Ins. Co.*, 1998 WL 526880 (10th Cir., Utah) slip op. at n.6; *S.E.C. v. Lavin*, 111 F.3d 921, 933 (D.C. Cir. 1997).

32. The consultant reports as described do appear to constitute attorney work-product, whether they were prepared for a corporate employee acting as a lawyer or a corporate employee who directed their preparation to assist a lawyer in preparation for litigation. We note, however, that under the definition of work-product, these reports cannot be considered to have been commissioned solely for the purpose of litigation since the recommendations contained within will inform technical specialists as to upgrades and modifications of facilities, network elements, standards, interfaces, and procedures necessary to provide the interconnectivity and access required by the federal act. *Southern Bell,* 632 So.2d at 1384-1385. Nevertheless, even as attorney work-product, the underlying facts contained in the consultants' reports that may be reasonably segregated from attorney mental impressions, opinions and legal theories should be disclosed. 6 Moore's Federal Practice Section 26.70[2][a]. Again, this determination can only be made after an in camera review of the documents.

33. U S WEST notes that to the extent the work-product doctrine applies, the consultant reports should not be disclosed unless the requesting party "has a substantial need for the reports and is unable to obtain substantially equivalent information by other means without undue hardship." 1998 NMRA Rule 1-026; U S WEST 8/18 Response at 22. Similarly, in pressing its argument that the reports should not be disclosed because they were prepared by experts who will not testify, U S WEST states that such reports require "a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." 1998 NMRA Rule 1-026(B)(6); U S WEST 8/18 Response at 24.

34. These showings have been made in this case. The special circumstances of a Section 271 case analysis are unique because they essentially require a comparison of the OSS operations provided to CLECs with the internal OSS that U S WEST provides itself and its customers. *Ameritech Michigan* FCC 97-137 at ¶¶ 138, 161 The only way this determination can be made is by comparing the two types of services and looking at the data and analysis relevant to each. Only U S WEST has access to this information because only U S WEST has the data about its own operations and customer services with which to make the required comparison. Likewise, only the consultants retained by U S WEST itself would be in the position to have unfettered access to the critically important internal information about the services U S WEST provides itself and its own customers. In these circumstances, the requesting party and all intervenors granted access to the same information do have a substantial need for the reports and they are unable to obtain any substantially equivalent information by other means without undue hardship. There simply is no other realistic way to obtain the relevant facts about U S WEST's internal operations, and without these the required comparisons cannot be made.

35. For the same reasons, these seem to be precisely the type of exceptional circumstances that the rules of civil procedure contemplate before requiring disclosure of the facts or opinions held by an expert who is not expected to be called as a witness at trial. Fed. R. Civ. Pro. 26(b)(4)(B); *See, Braun v. Lorillard, Inc.*, 84 F.3d 230, 236 (7th Circ. 1996). It is impracticable if not impossible for any other party besides U S WEST to have access to the internal operations of U S WEST that must be considered before any informed conclusion can be reached about whether U S WEST is providing nondiscriminatory access to its OSS operations and related services as required under Section 271.

36. Because New Mexico courts have not yet ruled that there is a corporate self-evaluation privilege that applies to documents such as those in dispute here, we decline to address the merits of this argument. We nevertheless assume, without deciding, that the same factual disclosure requirements that were noted in the privilege discussion above would apply with at least equal force to the corporate self-evaluation privilege were it to be recognized in New Mexico.

B. U S WEST'S DISCOVERY REQUESTS OF THE CLECs

37. U S WEST submitted a set of discovery requests to each of the CLEC parties listed above. Each of these intervenors received 87 requests.[6] These 87 data requests are identical and request a considerable amount of information from the intervenors about operational support systems, performance measures, local service entry, and other matters.

38. U S WEST argues essentially that the discovery it seeks from the intervenor CLECs is relevant to the extent it shows that any Section 271 operational shortfalls are not its fault. The CLECs object to the discovery. They argue that their operations are totally irrelevant to a Section 271 case, and that it is only what U S WEST provides in interconnection and operational support systems that matters.

39. As stated above, the burden in a Section 271 case does rest squarely on the applicant. *Ameritech Michigan* FCC 97-137 at ¶ 43. Discovery should be allowed to proceed if it will likely produce relevant evidence or it appears reasonably calculated to lead to the admission or discovery of relevant evidence.

[6] The only exception was AT&T. It received 88 requests. The difference is Request No. 72 to AT&T, which is discussed infra, at ¶ 81. The analysis in this decision is based on the identical 87 requests submitted to all the other CLECs.

40. On the other hand, discovery should not be overly broad, unduly burdensome, or expensive. *See*, e.g., e.spire's Reply to U S WEST's Response to Joint Motion for Protective Order and Response to Motion to Compel Responses at ¶ 8; Fed. R. Civ. Pro. 26(b)(2)(ii).

41. Many of U S WEST's discovery requests are designed to elicit information regarding the capability of the CLECs' internal OSS. U S WEST also argues that if a CLEC's OSS are not capable of handling electronic interfaces with U S WEST's OSS, then U S WEST should be afforded the opportunity to "assert that its own OSS could have no negative effect upon the customer experience." U S WEST's Renewed Motion at 7. The Company adds "[t]o the extent that U S WEST learns that Intervenors have no [EDI] system, it would help to establish that Intervenors have no present intention of entering the local market through use of U S WEST's systems." *Id.* at 8.

42. In explaining its need for the information regarding the time a CLEC spends placing an order using a non-EDI or graphical user interface, (Request Nos. 26 and 28), U S WEST explains that "access to U S WEST's OSS is supposed to protect against a negative customer experience. To the extent that an intervenor's systems are either the problem or contain just as much delay, U S WEST would be able to assert that its systems are not affecting the customer experience." *Id.* at 10-11.

43. The internal methods of the CLECs are not, however, at issue in this case. Since this is a Track A application, it is U S WEST that must show that "[i]nterconnection [is provided] in accordance with the requirements of sections 251(c)(2) and 252(d)(1)." Section 271(c)(2)(B)(i).

44. Subsection 251(c)(2)(C) requires incumbent local exchange carriers like U S WEST to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself. . . ."

45. U S WEST's submission suggests that if the CLECs are not in the position to take advantage of EDI,[7] then U S WEST is not obligated to provide the capability. We disagree. As noted by the U. S. Court of Appeals for the Eighth Circuit: "While the phrase 'at least equal in quality' leaves open the possibility that incumbent LECs may agree to provide interconnection that is superior in quality when the parties are negotiating agreements under the Act, this phrase mandates only that the quality be equal--not superior. In other words, it establishes a floor below which the quality of the interconnection may not go." *Iowa*, 120 F.3d at 813. (emphasis added).

46. In the Commission's AT&T Arbitration Case, we addressed the provision of operational support systems and electronic interfaces. We found that the federal act requires "U S WEST [to] take the necessary steps to create electronic interfaces that will provide AT&T and other CLECs with ordering processes that are equal to the ordering processes U S WEST has available to itself." *In the Matter of the Interconnection Contract Negotiations Between AT&T Communications of the Mountain States, Inc. and U S WEST Communications, Inc., Pursuant to 47 U.S.C. Section 252*, SCC Docket No. 96-411-TC ("SCC Docket No. 96-411-TC"), at ¶ 386.

[7] EDI is a form of electronic interface between computer systems. In the AT&T arbitration case, we stated that "Electronic interfacing involves the implementation of telecommunications application programs that would allow U S WEST programs to communicate directly with AT&T programs without human intervention." SCC 96-411-TC at ¶ *376*.

47. Based on our reading of the federal act, our order in SCC Docket No. 96-411-TC, the *Ameritech Michigan* FCC 97-137 Order, and the Eighth Circuit's decision in *Iowa*, we conclude that any internal matter such as how a CLEC currently initiates an order on its own system is of no relevance. It is U S WEST that has to satisfy the statutory requirement of showing that it has provided access to its operational support systems that is at least equal in quality to those levels at which it provides these services to itself. What the CLECs do in their own internal operations is not relevant to a Section 271 proceeding. *See Notice of Commission Action on Discovery Objections*, Docket No. D97/5/87 (Montana Public Service Commission) (June 26, 1998) ("Montana Commission Order") where in an almost identical proceeding the Montana Commission concluded that "[i]nformation of CLEC systems is not relevant to the issue of whether U S WEST has met the requirements of [Section] 271, nor is the information requested likely to lead to the discovery of relevant information." (Slip Op. at 2.)[8]

48. The FCC stated in its *Ameritech Michigan* FCC 97-137 decision that "[f]or those OSS functions provided to competing carriers that are analogous to OSS functions that a BOC provides to itself in connection with retail service offerings, the BOC must provide access to competing carriers that is equal to the level of access that the BOC provides to itself, its customers or its affiliates, in terms of quality, accuracy and timeliness." *Ameritech Michigan* FCC 97-137, ¶139.

49. Nondiscriminatory access is not defined in terms of providing no worse access to the operational support systems than a CLEC provides to itself. It is the BOC's, not the

[8] We respectfully note but decline to follow the approach taken by the Special Master and the Public Service Commission in Nebraska in that Section 271 proceeding. The lack of any written opinion with analysis from Nebraska is significant. Further, the transcript reference submitted by AT&T on the special master's comments

CLEC's, system that is relevant. Since nondiscriminatory access to U S WEST's OSS is the clear threshold test for discrimination, we find that data requests that seek information about how CLECs use their own OSS to serve their own retail customers to be irrelevant to the subject matter in the pending case. As the Montana commission correctly noted, "CLECs' systems, processes and practices do not have to meet the [Section] 271 standards and thus are not acceptable to serve as benchmarks for U S WEST's performance." Montana Commission Order at 2. Stated most simply, if a CLEC takes two months or two minutes to internally process an order on its own network is of no relevance to this proceeding. Rather, the legal test for nondiscrimination is whether access to U S WEST's OSS is provided by U S WEST in a nondiscriminatory manner.

50. We have reviewed the U S WEST discovery requests against the above-described general standards and find that the following requests are not likely to lead to the discovery of admissible evidence or are overly broad or burdensome: U S WEST Request Nos. 1-15, 17, 20, 28, 30, 32-42, 48-52, 54(c), 54(d), 55-56, 59, and 75-87.[9]

51. For example, Discovery Request No. 1 states: "For each state in which [the CLEC] has operations and is providing customers with telecommunications services, please identify the electronic interfaces [the CLEC] uses to support the services it provides." U S WEST contends that this request is "highly relevant" because it "asks the Intervenors if they intend to commit to work with U S WEST to develop a production ready EDI interface and, if so, when." *See* U S WEST Renewed Motion at 12.

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indicates a hesitation to review particular discovery requests for relevance. AT&T Response to U S WEST's Renewed Motion, filed September 17, 1998 at 5 and 6.

[9] *See*, n. 5 and n. 9.

52. We disagree. The request asks about the CLECs' current practices and makes no mention of the CLECs' willingness to commit to work with U S WEST to develop a production ready EDI interface. Furthermore, the internal electronic interfaces used by the CLECs are not at issue in this proceeding. This is not likely to lead to admissible evidence because "it is [U S WEST's] practices that are under scrutiny in this proceeding, not the practices of CLECs." See e.spire's Reply to U S WEST's Response to Joint Motion for Protective Order and Response to Motion to Compel Responses at ¶ 11.

53. U S WEST offers the same explanation for Request No. 30. U S WEST contends that this request is "highly relevant" because it "asks the intervenors if they intend to commit to work with U S WEST to develop a production ready EDI interface and, if so, when." U S WEST Renewed Motion at 12.

54. At Request No. 30, U S WEST asks for information regarding the identity of who developed the CLEC's electronic interfaces with any ILECs, the time it took to develop the interfaces, and "the total cost incurred to develop the interface." U S WEST asserts that the purpose of this request is to ascertain if the CLECs will work with U S WEST to develop a production ready EDI interface. U S WEST's Renewed Motion at 12.

55. As stated above, however, the relevant issue is the degree to which U S WEST is providing nondiscriminatory access to its OSS. The work a CLEC has done to develop its own electronic interfaces is not relevant.

56. Through Discovery Request No. 41, U S WEST asks the CLECs if they intend to commit to the availability of a production-ready OSS EDI for their own residential and small business customers. Again, however, the relevant issue is the degree to which U S WEST is providing nondiscriminatory access to its OSS, not the internal practices of the CLECs.

57. In Request No. 10, U S WEST asks if the CLEC has a "real time order operational support system that [CLEC] service representatives use to place customer service requests or local service requests or any other requests for local telecommunications products or services." Once again, U S WEST misconstrues the focus of this Section 271 case. The issue in this proceeding is not the system used by the CLEC; rather, U S WEST must show that its OSS offers nondiscriminatory access to unbundled network elements and that the "OSS functions provided to competing carriers ... are analogous to OSS functions that a BOC provides to itself in connection with retail service offerings." *Ameritech Michigan* FCC 97-137 at ¶139. *See* also *Ameritech Michigan* FCC 97-137 at ¶141.

58. For the same reason, U S WEST's motion to compel responses to Request Nos. 11 through 15 is denied.

59. In denying Request Nos. 10 through 15, we emphasize that that these requests were not limited to information that addressed the OSS used to interface with U S WEST, the ILEC at issue in this case. Where relevant information regarding direct interfaces between U S WEST and a CLEC has been requested, such as in Request Nos. 18, 22, 31, and 34, this Commission has concluded that the information should be provided by the CLEC. This information might reasonably lead to the introduction of relevant evidence about whether and the extent to which U S WEST is offering nondiscriminatory access as required under Section 271.

60. With regards to the information sought at Request Nos. 47 and 53, U S WEST should have information regarding its own communications with the CLECs. If U S WEST does not have the requested data, insofar as the requests concern its performance and contacts with the CLECs, U S WEST is instructed to contact the CLECs for the requested information.

U S WEST is not required to reissue this request. Rather, the CLEC is required to provide the requested information if U S WEST states that it does not have the information.

61. The queries about a CLEC's relationship with other ILECs as sought in Request Nos. 47 and 53 are not expected to provide information that is likely to lead to admissible evidence because it is only U S WEST's practices that are relevant to the subject matter of this proceeding. Therefore, information sought about other ILECs in these requests should not be provided.

62. U S WEST has requested information about the CLECs' contacts with U S WEST (e.g., Request Nos. 77-87). This information should also already be in the hands of U S WEST.

63. U S WEST has requested information about the CLECs' internal performance standards (Request Nos. 48-52). U S WEST argues that these requests seek relevant information because: "To the extent that Intervenors utilize such performance data, it may establish that the service that U S WEST provides is better than that which the Intervenor provides its own customers." U S WEST's Renewed Motion at 14.

64. Once again, however, the issue in this proceeding is not a CLEC's own performance standards. Rather, U S WEST must show that its OSS offers nondiscriminatory access to its unbundled network elements and that the "OSS functions provided to competing carriers are analogous to OSS functions that a BOC provides to itself in connection with retail service offerings . . ." *Ameritech Michigan* FCC 97-137 at ¶ 139.

65. Request No. 28 asks the intervenors for data on how long it takes a CLEC representative to key an order into the CLEC's legacy system for different types of orders. U S

WEST contends that this information would help it determine if "an intervenor's systems are either the problem or contain just as much delay . . ." U S WEST's Renewed Motion at 11.

66. We disagree. The legacy systems used by the CLECs are not at issue in this proceeding. This is not likely to lead to admissible evidence because "it is [U S WEST's] practices that are under scrutiny in this proceeding, not the practices of CLECs." e.spire's Reply to U S WEST's Response to Joint Motion for Protective Order and Response to Motion to Compel Responses at ¶ 11.

67. In Request Nos. 72-74, U S WEST asks the CLECs to speculate about the effects of U S WEST's entry into the long distance market. This proceeding is being conducted in New Mexico because the Federal Communications Commission has an obligation to consult with us regarding U S WEST's petition to enter the interLATA market. The FCC is directed to consult with us "to verify the compliance of the Bell operating company with the requirements of subsection (c)." §271(d)(2)(B). As noted above, subsection (c) identifies a 14 point checklist that U S WEST must satisfy. The likely impact of US WEST's operations on the interLATA market is not one of those 14 points. However, the likely impact of U S WEST's entry on the interLATA market may be part of the public interest criterion that is considered by the Federal Communications Commission when it evaluates whether to grant U S WEST's application. §271(d)(3)(C).

Likewise, this Commission is not precluded from considering whether the granting of U S WEST's petition to the FCC is in the public interest. A few parties have requested that we make a finding on this topic. For example, the State Attorney General's witness states that "The FCC has the duty to confer with the New Mexico State Corporation Commission on whether U S WEST has met the requirements of Track A and the terms of the competitive

checklist in New Mexico. The Commission also has the prerogative to advise the FCC on whether granting the application will serve the public interest." Testimony of Ronald Binz on behalf of the Attorney General of New Mexico, July 27, 1998, at 14. Also, U S WEST requests an order from this Commission in which, among other things, we "[a]dvis[e] the FCC that it would be in the public interest of the State of New Mexico for the FCC to grant U S WEST authority to enter the interLATA long distance market in this state." Direct Testimony of Mary S. Owen, U S WEST, June 2, 1998 at executive summary.

At this juncture we do not want to preclude ourselves from addressing the issue of whether the granting of US WEST's petition to provide interLATA services is in the public interest. Therefore, the parties are required to provide responses to Request Nos. 72 - 74.

68. The CLEC parties are required to provide responses to the following U S WEST Discovery Requests: Nos. 16, 18-19, 21-26, 29, 31, 44, 54(a), 54(h), 60, 61 and 63-74 as explained infra.

69. As stated above, the intervenening CLECs have objected to some of U S WEST's discovery requests because they seek disclosure of proprietary information. Given the Protective Order filed in this proceeding, these objections have no merit.

70. We require the CLECs to provide certain information regarding their OSS interface needs that may impact directly upon U S WEST. The Federal Communications Commission has stated: "The Commission will examine operational evidence to determine whether the OSS functions provided by the BOC to competing carriers are actually handling current demand and will be able to handle reasonably foreseeable demand volumes." *Ameritech Michigan* FCC 97-137 at ¶ 138. Therefore, the type of information requested by U S WEST at, for example, Request Nos. 18, 19, 44, 57, and 58, are relevant and may be expected

to lead to the admission of relevant evidence in this proceeding regarding reasonably anticipated future demand.

71. Similarly, in assessing the reasonably foreseeable demand issue, the CLECs should respond to Request Nos. 63-71, but only to the extent the requests seek information about U S WEST's 13-state region. All of these requests appear reasonably related to assessing the demands that may be placed on U S WEST for effective competition in the local market in New Mexico, and that is the focus of this Section 271 inquiry.

72. If a CLEC does not provide the type of information requested at Request Nos. 18, 19, 44, 57, 58, and 63-71, then the Commission will consider such non-responsiveness when weighing the CLEC may not submit testimony to the effect that U S WEST's OSS does not meet the CLEC's speculative, future needs. That is, in order to determine if U S WEST's OSS meets the "reasonably foreseeable demand volumes" of the CLECs, the CLECs must identify those needs. If a CLEC fails to identify those needs, the Commission may decide to discount the probity of evidence offered by the non-responsive CLEC regarding the inadequacy of U S WEST's OSS to satisfy future demand.

73. When responding to Request No. 52, the CLEC is only required to provide information regarding its reasonably foreseeable demand for use of U S WEST's systems for pre-ordering, ordering, billing, maintenance and repair functions. We believe this clarification is necessary since U S WEST did not indicate what activities were to be included in the calculation of the "total demand."

74. Discovery Request Nos. 21-26 seek information on the type of OSS used by the CLECs to place orders with ILECs. Although information about other ILECs would not normally be relevant to this proceeding, we find that the information sought in these particular

requests that focus on ILEC interfaces may possibly lead to the admission of relevant information in this proceeding. The CLECs are therefore ordered to respond to these requests.

75. The CLECs are also required to respond to Discovery Request No. 27 to the limited extent that U S WEST seeks information about maintenance or repair orders that the CLEC has placed with ILECs in New Mexico for local interconnection, unbundled network elements, and resale. Maintenance and repair orders for other activities, such as access, are not relevant.

76. The CLECs are not required to provide the information sought in Request No. 20 because the number of employees that carry out an internal function is not at issue in this proceeding. On the other hand, the number of orders that it can issue, as sought in Request No. 29, may be of significant relevance.

77. The CLECs are required to answer Request No. 43 to the limited extent that U S WEST is seeking information about orders submitted to an ILEC for local interconnection, unbundled network elements, and resale.

78. In Request Nos. 45 and 46, U S WEST seeks information about testing the CLECs have undertaken with ILECs. U S WEST explains that the requested information will "shed light on the number of transactions that U S WEST should reasonably expect in the coming months." U S WEST Renewed Motion at 12 and 13. The CLECs are required to respond to Request Nos. 45 and 46 to the extent that U S WEST is seeking information about internal testing between the CLEC and U S WEST. The CLEC is not required to provide information about testing conducted with other ILECs. Information regarding testing with other ILECs will not "shed light on the number of transactions that U S WEST should reasonably expect in the coming months."

79. The CLECs are required to respond to Request No. 62. The CLECs do not, however, have to provide the documents requested by U S WEST because the particular details of the internal business plans of the CLECs do not appear reasonably calculated to lead to the admission of relevant evidence.

80. The CLECs are required to respond to Request Nos. 25 and 26. Their responses to these items will assist in the determination of the degree to which graphical interfaces provide "eas[y] and efficien[t]" access to U S WEST's OSS. U S WEST's Renewed Motion at 10.

81. As noted supra, AT&T received one request which the other CLECs did not: No. 72. That request asks AT&T to produce all documents concerning its decision to enter the local market in Connecticut. We in New Mexico fail to see the relevance of AT&T's decision to enter the market in Connecticut. AT&T does not have to respond to that request.

IT IS THEREFORE ORDERED THAT:

1. AT&T's Motion to Compel Responses to its First Discovery Requests will not be finally decided until after in camera review by the Commission of the 25 disputed documents. U S WEST shall provide for in camera review the 25 disputed documents, as identified in the Privilege Log, to the Commission and its expert consultant, Dr. David Gabel, on or before September 23, 1998.

2. U S WEST's Motion to Compel Responses to its First Set of Requests for Discovery Responses from the intervenor CLECs in this proceeding and the intervenor CLECs' motions to quash and for a protective order are GRANTED in part and DENIED in part as set forth in this decision. The CLECs do not have to respond to the following U S WEST Discovery Requests: Nos.1-15, 17, 20, 28, 30, 32-42, 48-52, 54(c), 54(d), 55, 56, 59, and 75-

87[10]. The CLECs shall respond in full, consistent with the expedited discovery time frames previously specified for this proceeding, to U S WEST Discovery Request Nos. 16, 18-19, 21-26, 29, 31, 44, 54(a), 54(b), 60, 61, and 72-74. AT&T is not required to respond to the separate Request No. 72 asked of it. The CLECs shall respond to the remaining U S WEST Discovery Request Nos. 27, 43, 45-47, 53, 57, 58, 62-71 as directed in this decision.

3. U S WEST's Motion to Set Pending Discovery Motions for Hearing and U S WEST's Renewed Motion Requesting a Hearing and Oral Argument are **DENIED.**

[10] *See*, n.5. Because the Requests directed at AT&T had one request, No. 72, that was not posed to the other CLECs, AT&T, when construing this order, must increase by one the number of each Request No. above No. 72. That is, AT&T must respond to Request Nos. 73-75 asked of it, and it need not respond to Request Nos. 76 - 88.

DONE this 21st day of September, 1998.

JEROME D. BLOCK, Chairman

ERIC P. SERNA, Commissioner

BILL POPE, Commissioner

ATTEST:

Orlando Romero, Chief Clerk